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EUROPEAN PUBLIC
TELECOMMUNICATIONS
NETWORK
OPERATORS' ASSOCIATION

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr Peter Cowhey
Chief, International Bureau
Federal Communications Commission
Fax: +1 202 418 28 24

Brussels, 11 August 1997

Dear Mr Cowhey,

ETNO Reply comments to the FCC's Notice of Proposed Rulemaking "In the Matter of Rules and Policies on foreign participation in the US Telecommunication markets - IB Docket No. 97-142"

I have pleasure in enclosing, for your consideration, an ETNO Reflection Document setting out our Members' views on the above-mentioned NPRM.

As you may know, ETNO is the principal trade association for European telecom operators representing 37 companies from 32 countries (including all EU Member States). The enclosed position paper has been unanimously approved by the Association's Members.

Yours sincerely,

pp Jerker Torngren
ETNO Director

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**ETNO Reflection Document****REPLY COMMENTS TO THE FCC'S NOTICE OF PROPOSED RULEMAKING
"RULES AND POLICIES ON FOREIGN PARTICIPATION IN THE U.S. TELECOMMUN-
CATION MARKETS"**

ETNO is the European Telecommunications Network Operators' Association, representing 37 companies from 32 European countries. The objective of ETNO is to encourage and contribute to a constructive dialogue between its Members and with other actors involved in the development of the European Information Society, for the benefit of its users. Furthermore, ETNO shall contribute to the development of policies leading to an efficient and fair regulatory and trading environment for the European Telecommunications marketplace and for its Members when operating outside Europe.

First of all, ETNO welcomes the United States' commitment to worldwide liberalization of telecommunications markets in the WTO Agreement on Basic Telecommunications. The U.S., together with the EU-Commission, have taken on a leadership role in this process and ETNO would like to urge the United States to continue on in this direction. Thus, ETNO encourages the FCC to fully implement the U.S. Commitment made under the WTO.

Because of this position, all WTO member countries are now looking towards the U.S. for its proposal on the implementation of the WTO Basic Telecoms Agreement. Like with all signatories to the Agreement, it will be expected that the implementation be fully consistent with each country's Schedule of Commitments.

As for European Union Member States, they will liberalize their telecommunications markets by January 1, 1998, consistent with the European Union's Schedule of Commitments. As far as deferments of this schedule apply, these have been reserved in the Schedule of Commitments.

1. Effective Competitive Opportunity Test

Regarding the implementation proposal released by the Federal Communications Commission ("FCC"), ETNO welcomes the FCC's proposal to abolish the Effective Competitive Opportunity ("ECO") Test. ETNO agrees with the FCC that the ECO Test as adopted by the FCC in its Foreign Carrier Entry Order is incompatible with the WTO Agreement on Basic Telecommunications and, thus, needs to be repealed.

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As stated by the FCC in its Notice of Proposed Rulemaking ("NPRM"), because of its emphasis on reciprocity, a continued application of the ECO Test would violate the commitment to market access which the United States made in its Schedule to the WTO Basic Telecom Agreement.

However, ETNO wishes to express some concerns regarding the FCC's implementation proposal:

2. "Public Interest" Test

To start with, ETNO is deeply concerned that the FCC plans to use the "public interest" test in assessing whether foreign carriers should be allowed market access in the United States. This broad test constitutes a reservation which is not covered by a corresponding reservation in the United States' Schedule of Commitments and will, therefore, violate the Market Access Principle of the WTO Basic Telecom Agreement. Also, the FCC's proposed assessment of the competitive environment in a foreign carriers' home country would interfere with the Member States' domestic policies.

Furthermore, the "public interest" test will constitute a violation of the Most Favored Nation ("MFN") principle.

Under the Most Favored Nation principle, a WTO Member State is not allowed to distinguish between "like" carriers from other WTO Member States. In particular, a Member State may not discern between carriers on the basis of reciprocity. However, the FCC proposes to reserve for itself the right to make a distinction between foreign carriers based upon vague "public interest" concerns such as dominance in the carriers' home markets, existence of competition in their home markets, as well as U.S. domestic issues such as national security, trade, foreign policy, and law enforcement. As a result of the application of the "public interest" test, the FCC will distinguish between foreign carriers; some carriers will be granted access to the U.S. telecommunications market, others will not. A distinction between foreign carriers on this basis is not compatible with the Most Favored Nation principle.

In addition, the "public interest" test will violate the National Treatment clause.

Under the National Treatment clause, the United States is required to treat foreign carriers no less favorable than it treats "like" U.S. carriers. However, the application of the "public interest" test will result in the different treatment of U.S. carriers and foreign carriers since U.S. carriers will have immediate access to the U.S. market. Foreign carriers, on the other hand, can only gain access after passing a cumbersome and, if the ECO Test gives any indication, time-consuming "public interest" scrutiny. This is true even when the U.S. carrier has ownership interests in foreign

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carriers. Such a distinction among domestic and foreign carriers is incompatible with the National Treatment clause.

Likewise, the "public interest" test will violate the GATS requirement of "reasonable, objective and impartial" domestic regulation (Article VI). The test is vague and lacks the necessary transparency. Also, since the FCC does not provide objective criteria for a violation of the public interest, this standard is inherently subjective. And lastly, the FCC's reference to factors such as foreign policy or trade will allow for a significant political influence on the licensing process and could constitute an unacceptable interference with Member States sovereignty.

3. Competitive Safeguards

Finally, ETNO would like to point out significant concerns regarding the imposition of basic and supplemental safeguards on dominant foreign carriers as proposed by the FCC.

Such safeguards are not compatible with the WTO Basic Telecom Agreement because the United States Schedule of Commitments does not contain a corresponding reservation. Further, because of the distinction between U.S. and foreign carriers and the distinction among foreign carriers, the application of these safeguards raises essentially the same questions regarding the Most Favored Nation principle and the National Treatment clause. Furthermore, the FCC assessment, based on a national market appraisal, is no more valid. As a result of globalisation of the telecommunication markets, it would be more consistent and efficient to only scrutiny dominant situations in a relevant market.

The market entry of numerous foreign carriers will improve the competitive environment in the United States. Transparent and non-discriminating domestic regulatory regimes together with domestic competition law will be sufficient to guarantee fair competition and to prevent carriers from creating anticompetitive advantages. Considering the ITU expertise on telecommunications, the ITU should be assigned the mission to monitor the WTO telecommunications agreements.

ETNO herewith appeals to the United States to keep the momentum shown in the WTO Basic Telecom negotiations by ensuring a transparent, non-discriminating, and WTO-compatible implementation of the Basic Telecom Agreement.